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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7.

* A/71/150.

** The present report was submitted after the deadline in order to reflect the most recent developments.

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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

The present report, the sixth annual report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, outlines the key activities undertaken by the Special Rapporteur from February 2016 to August 2016, addresses the impact of counter-terrorism measures on the human rights of migrants and refugees and concludes with a series of recommendations.

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I. Introduction

1. The present report, submitted to the General Assembly pursuant to its resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7, sets out the activities of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism from February 2016 to August 2016, examines the impact of counter-terrorism measures on the human rights of migrants and refugees and presents a series of recommendations.

II. Activities of the Special Rapporteur

2. The activities of the Special Rapporteur since the issuance of his previous report to the General Assembly (A/70/371) are set forth in his most recent report to the Human Rights Council (A/HRC/31/65).

3. In addition to the activities described in the report, on 8 February 2016, the Special Rapporteur participated in a symposium in Paris on assessing the consequences of counter-terrorism laws and procedures on French society and civil liberties, organized by Amnesty International, the Human Rights League, Human Rights Watch and the International Federation for Human Rights.

4. On 11 February 2016, the Special Rapporteur participated by videolink in a conference on the promotion and protection of the human rights of victims of terrorism, organized in New York by the United Nations Counter-Terrorism Centre, under the auspices of the Working Group on Supporting and Highlighting Victims of Terrorism of the Counter-Terrorism Implementation Task Force.

5. The Special Rapporteur has continued to pursue dialogue with governments, including by sending requests for official visits. He regrets, however, that, despite long-standing requests, no invitations were received during the reporting period.

III. Impact of counter-terrorism measures on the human rights of migrants and refugees[1]

6. Informed sources are now predicting that, in the absence of an elusive diplomatic settlement or decisive military intervention, the armed conflicts in the Syrian Arab Republic are likely to continue for the next several years. The conflict has already resulted in an unprecedented movement of civilian populations, a phenomenon that has now begun to spread to asymmetrical conflicts in other parts of the world. In that context, the relationship between irregular migration and terrorism raises a number of acute dilemmas in terms of law and policy. Terrorist groups currently control territory and participate in armed conflicts in a number of regions. Governments, international organizations and civil society are increasingly concerned about violent extremism and how to tackle it (see A/HRC/31/65). Associated with those phenomena, there is a growing perception that the movement of people is a threat to national security as many people flee areas where terrorist

[1] The Special Rapporteur wishes to express his thanks to Anne Charbord, Senior Legal Adviser, and Jessica Jones, Legal Adviser, for their assistance in the preparation of the present report.

groups are active, while others migrate into such areas to participate in fighting. As noted in a report of the Secretary-General, "migratory flows have increased both away from and towards the conflict zones, involving those seeking safety and those lured into the conflict as foreign terrorist fighters, further destabilizing the regions concerned" (see A/70/674, para. 2).

7. While data on migration should be used with caution,[2] reliable sources have indicated that, in 2015, the total number of displaced people around the world reached 65.3 million, with more than 12.4 million people forced to leave their homes over the course of the year.[3] According to estimates of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) and the International Organization for Migration (IOM), over 1 million migrants entered Europe in 2015,[4] which represented a significant increase over 2014.[5] Reports that a Syrian passport was found on one of the individuals who had carried out the November 2015 terrorist attack in Paris[6] have contributed to fears that members of terrorist groups might exploit migratory flows. The link between displacement and radicalization has also been drawn, raising concerns that refugee camps could become recruiting grounds for terrorist groups.[7]

8. There is little evidence, however, that terrorists take advantage of refugee flows to carry out acts of terrorism[8] or that refugees are somehow more prone to radicalization than others, and research shows that very few refugees have actually carried out acts of terrorism.[9] As noted by a representative of the Office of the

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[2] Frank Laczko et al., "Migrant arrivals and deaths in the Mediterranean: what do the data really tell us", *Forced Migration Review*, Issue No. 51 (January 2016).

[3] UNHCR, "Global trends: forced displacement in 2015". Available from www.unhcr.org/576408cd7. According to UNHCR, the total number of forcibly displaced people worldwide rose from 51.2 million in 2013 to 59.5 million in 2014.

[4] FRONTEX, "Risk analysis for 2016". Available from http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf. FRONTEX detected over 1.8 million "illegal" border crossings at the external borders of the European Union in 2015, which it associated with 1 million individuals; and IOM, "Mixed migration flows in the Mediterranean and beyond: compilation of available data and information (2015)". Available from http://doc.iom.int/docs/Flows%20Compilation%202015%20Overview.pdf. According to IOM, 1,046,199 individuals arrived in Europe in 2015, including 1,011,712 by sea.

[5] FRONTEX, "Risk Analysis for 2015". Available from http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf. FRONTEX detected 280,000 "illegal" border crossings at the external borders of the European Union in 2014, in contrast with the figure of 1.8 million for 2015.

[6] Marcus Walker and Noemie Bisserbe, "Paris stadium attacker got to Europe using fake Syrian passport", *Wall Street Journal*, 16 November 2015.

[7] Khalid Koser and Amy E. Cunningham, "Migration, violent extremism and terrorism: myths and realities", *Global Terrorism Index 2015: Measuring and Understanding the Impact of Terrorism* (Institute for Economics and Peace, 2015); and World Bank, "Migration and violent extremism in contemporary Europe", 16 March 2016. Available from http://blogs.worldbank.org/peoplemove/migration-and-violent-extremism-contemporary-europe.

[8] UNHCR, "UNHCR chief says it is 'absolute nonsense' to blame refugees for terror", 17 November 2015; and Ishaan Tharoor, "Were Syrian refugees involved in the Paris attacks? What we know and don't know", *The Washington Post*, 17 November 2015.

[9] Kathleen Newland, "The United States record shows refugees are not a threat", October 2015. Available from www.migrationpolicy.org/news/us-record-shows-refugees-are-not-threat.

United Nations High Commissioner for Refugees (UNHCR), "there is a clear perception in some quarters that asylum is misused to hide or provide safe haven for terrorists. Such perceptions are analytically and statistically unfounded, and must change".[10] In its 2016 European Union Terrorism Situation and Trend Report, Europol also noted that there was no evidence that terrorists were systematically using refugee flows to enter Europe.

9. It is critical to bear in mind that, in the clear majority of cases, refugees and migrants do not pose a risk, but are in fact at risk, fleeing the regions where terrorist groups are the most active. Terrorist activity in the country of origin is a significant driver of internal displacement and refugee flight: in 2014, over 16 million refugees and internally displaced persons came from the five countries with the highest levels of terrorism, and approximately 70 per cent of the total population of concern to UNHCR comes from the 20 countries with the highest number of terrorism-related fatalities.[11]

10. Thus, in many cases, migrants and refugees are themselves victims of terrorist violence (see A/HRC/20/14, paras. 11-16). They may either be fleeing the direct consequences of terrorist activity or the broader impact resulting from heightened levels of violence, reduced opportunities and a lack of prospects for themselves and their families.[12] No matter the reason for their flight, people in such circumstances are entitled to protection from the devastating consequences of terrorist activity rather than being stigmatized as potential terrorists,[13] and States must be cautious not to use security concerns as a means of denying humanitarian assistance to those migrants.[14]

11. The Special Rapporteur recognizes that border controls are part of a State's response to terrorist threats and agrees with UNHCR that there should be no avenue for those supporting or committing acts of terrorism to reach other territories, whether to find safe haven, avoid prosecution or carry out further attacks. Nevertheless, an effective response to security threats cannot be based on measures that restrict the movement of refugees and migrants and breach their rights. A worrying trend has been that "institutional and policy structures, migration and border controls have been increasingly integrated into security frameworks that emphasize policing, defence and criminality over a rights-based approach" (see A/HRC/23/46, para. 42).[15] States have introduced stricter border controls, built

[10] Vincent Cochetel, "Terrorism as a global phenomenon", UNHCR presentation to the joint seminar of the Strategic Committee on Immigration, Frontiers and Asylum and Committee on article 36, Ljubljana, 17 and18 January 2008.

[11] Institute for Economics and Peace, *Global Terrorism Index 2015: Measuring and Understanding the Impact of Terrorism* (Institute for Economics and Peace, 2015). Available from http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf.

[12] Khalid Koser and Amy E. Cunningham, "Migration, violent extremism and terrorism: myths and realities", in *Global Terrorism Index 2015* (Institute for Economics and Peace, 2015).

[13] See, for example, Security Council resolutions 2170 (2014) and 2258 (2015).

[14] See the address by the Assistant High Commissioner for Protection of UNHCR, Volker Türk, to the 44th INTERPOL European Regional Conference in Prague, 18 May 2016. Available from www.unhcr.org/admin/dipstatements/573c8e987/security-international-refugee-protection-unhcrs-perspective-volker-turk.html.

[15] Within Europe, the focus on police and security is clear from the increased investment in agencies such as FRONTEX. Despite the financial crisis, the FRONTEX budget has steadily increased from €19.2 million in 2006 to €143.3 million in 2015, a 646 per cent increase over eight years.

fences to keep migrants out,[16] engaged in push-back operations, criminalized irregular migration and abandoned pledges to accept refugees.[17] Far from increasing security, such approaches, which restrict access to safe territory, contribute to the establishment of chaotic and covert movements of people,[18] including through trafficking,[19] which might ultimately assist those intent on committing acts of terrorism.

12. It is important to note that there is also migration occurring towards areas where terrorist groups are active. Recent information indicates that there are between 25,000 and 30,000 individuals from more than 100 States involved with groups associated with Al-Qaida, Da'esh and others. Reports issued by the United Nations indicate that the number of fighters involved with those groups increased by 71 per cent between mid-2014 and March 2015 (see E/CN.15/2016/6, paras. 41 and 42). With States intent on preventing the ranks of terrorist groups from growing and preventing returning nationals from carrying out attacks on their own soil (so-called "blowback" attacks) and radicalizing others, decisive action has been taken to address the issue of foreign terrorist fighters pursuant to Security Council resolution 2178 (2014) through national implementation measures.

13. The report focuses on the impact of counter-terrorism measures on the human rights of migrants and refugees,[20] including the impact of measures to deal with migration from areas where terrorist groups are active, addressing the specific challenges of enhanced border controls, guarantees against the abuse of refugee status, the absolute prohibition of refoulement and the detention of migrants (sect. III. A); examines measures to address migration to areas where terrorist groups are active, including the foreign terrorist fighter phenomenon (sect. III. B); and provides relevant conclusions and recommendations (sect. IV). The report builds on the report on refugee protection while countering terrorism, submitted to the General Assembly at its sixty-second session by the previous Special Rapporteur (A/62/263), and the reports of the Special Rapporteur of the Human Rights Council on the rights of migrants (in particular A/HRC/23/46 and A/HRC/29/36). The Special Rapporteur stresses that the report is written from a human rights perspective and draws attention to the mandate and responsibility of UNHCR as

[16] George Jahn, "Austria joins other European Union nations to build fence along borders to slow migrant flow", *The Star*, 28 October 2015.

[17] *Al Jazeera*, "Poland refuses to accept refugees after Brussels attack", 23 March 2016.

[18] See Human Rights Watch, "Blaming refugees or Muslims while missing the boat on terrorism", *World Report 2016: Events of 2015* (New York, Seven Stories Press, 2016); François Crepeau and Anna-Purkey, "Facilitating mobility and fostering diversity: getting European Union migration governance to respect the human rights of migrants", Liberty and Security in Europe, No. 92 (Brussels, CEPS, May 2016); and A/HRC/29/36, paras. 24 and 25.

[19] UNHCR, "Addressing security concerns without undermining refugee protection: UNHCR's perspective", Rev. 2, 17 December 2015.

[20] See Office of the United Nations High Commissioner for Human Rights (OHCHR), "Recommended principles and guidelines on human rights at international borders" (Geneva, 2014), in which an international migrant is defined as "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations".

being at the core of his mandate and as the basis for his engagement (see A/62/263, para. 33).

A. Impact on the human rights of migrants and refugees of measures to address migration from areas where terrorist groups are active

1. Legal framework

14. The rights and freedoms stipulated in the Universal Declaration of Human Rights apply to migrants and refugees just as they do to any other group of individuals, as do the core rights protected under international customary law and enshrined in the International Covenant on Civil and Political Rights, which applies to "all individuals" within the territory of a State Party and subject to its jurisdiction (art. 2, para. 1). The right to seek and enjoy asylum is protected under article 14 of the Universal Declaration and article 18 of the Charter of Fundamental Rights of the European Union. Refugees are also covered under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

2. Key challenges to the effective protection of migrant and refugee human rights

(a) Enhanced border controls

15. The right to reach another State to seek protection is a cornerstone of the system of international refugee protection. Furthermore, pursuant to Security Council resolution 1373 (2001), States are required to prevent "the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents". As noted by the Working Group on Border Management and Law Enforcement relating to Counter-Terrorism of the Counter-Terrorism Implementation Task Force:

> "One significant consequence of the terrorist attacks carried out across the world over recent years is the increased linkage between the movement of people across borders and measures taken to safeguard national security ... measures aimed at preventing terrorism have become explicitly linked to the management and regulation of cross-border movements".[21]

16. Those measures often have a direct impact on the human rights of migrants and refugees. The Special Rapporteur recalls that, while States have a sovereign right to determine conditions of entry and stay in their territories, they also have an obligation to respect and protect the human rights of all individuals under their jurisdiction, regardless of their nationality, origin or immigration status. International borders are not zones of exclusion or exception with respect to human rights obligations, and a the jurisdiction of States at borders must, therefore, be exercised in a manner that is compatible with its human rights obligations towards all persons.[22]

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[21] See www.un.org/counterterrorism/ctitf/en/border-management-and-law-enforcement-relating-counter-terrorism.

[22] See OHCHR, "Recommended principles and guidelines on human rights at international borders", (Geneva, 2014).

17. All border governance measures, including enhanced screening processes at international borders, should always comply with the principles of legality, proportionality, necessity and non-discrimination. Profiling practices based on assumptions that persons of a certain racial, national or ethnic origin or religion are particularly likely to pose a risk may lead to practices with respect to border controls and counter-terrorism measures more generally[22] that are incompatible with the principle of non-discrimination (A/HRC/4/26). The blanket imposition of additional barriers to entry or screening for groups of people based on race, religion, ethnicity, nationality or religion may also constitute discrimination and a disproportionate interference with human rights (see A/HRC/4/26, paras. 35 and 36).[23] Any differential treatment of migrants at international borders must be in pursuit of a legitimate aim and must be proportionate and necessary.

18. Increasingly, States rely on data and intelligence to detect individuals with links to terrorist networks or who may have committed terrorist offences.[24] This has led to the proliferation of border surveillance systems, such as the proposed digital entry-exit system of the European Union.[25] International human rights law requires an evidence-based justification for any interference with the right to privacy, whether on an individual or mass scale. The greater the interference with protected human rights, the more compelling the justification for it must be if it is to meet the requirements of the International Covenant on Civil and Political Rights. Any data that is collected must be necessary for the purposes for which it was collected, and indiscriminate data collection is likely to breach data-protection rights (see A/69/397, paras. 11 and 12). The Special Rapporteur stresses that, while mass surveillance techniques may generate useful intelligence, this is not an adequate human rights law justification for their use, nor does it render mass surveillance lawful or reasonable (see A/69/397, paras. 11 and 12, and A/HRC/27/37, para. 24). As underscored by the Office of the United Nations High Commissioner for Human Rights (OHCHR), the collection of data at borders, in particular biometric data, must be accurate and up-to-date, proportionate to a legitimate aim, obtained lawfully, stored for a limited time and disposed of safely and securely. Border authorities must be trained properly on the risks, limitations and human rights impact of the technologies used.[22]

19. Information-sharing systems, such as the European Border Surveillance System, through which States members of the European Union and Schengen-associated countries exchange border management information with FRONTEX,

[23] House Democratic Caucus "Screening procedures for Syrian refugees". Available from https://price.house.gov/uploads/Screening%20Procedures%20for%20Syrian%20Refugees.pdf.

[24] See "National security: threats at our borders", testimony of Eleanor Acer before the United States House of Representatives at the joint subcommittee hearing of the Oversight and Government Reform Committee, the Subcommittee on National Security and the Subcommittee on Government Operations (23 March 2016).

[25] European Commission, "Communication from the Commission to the European Parliament and the Council: stronger and smarter information systems for borders and security" (Brussels, 6 April 2016). Available from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/20160406/communication_on_stronger_and_smart_borders_20160406_en.pdf.

raise additional risks.[26] All information must be gathered, stored and shared with sufficient safeguards to protect rights and must not be shared with third countries that might expose migrants and refugees to human rights violations, including refoulement or inhuman treatment.[27] The unlawful collection of data, such as the reported forced fingerprinting of migrants as part of their registration at European borders,[28] is an affront to individual dignity and may encourage the establishment of precarious covert routes between countries.

20. As the Special Rapporteur on the human rights of migrants noted in 2015, many migrants are already resorting to precarious routes between States because of a lack of regular migration opportunities (see A/HRC/29/36). States must recognize that irregular migration is often a feature of the flight of genuine refugees. Moreover, the Special Rapporteur recalls that migration is not a crime.[29] Accordingly, the term "illegal migrants" should not be used to refer to migrants in an irregular situation (see resolution 3449 (XXX)). States should not criminalize irregular entry or irregular stay,[22] and international refugee law expressly provides that refugees should not be penalized for illegal entry under certain conditions.[30] States should ensure that all measures aimed at addressing migration, including irregular migration, do not have an adverse impact on the human rights and dignity of migrants.[22]

(b) Guarantees against abuse of refugee status

21. As noted in above-mentioned report to the General Assembly at its sixty-second session, "unwarranted linkages between refugee protection and terrorist threats were made evident soon after the atrocious terrorist attacks of 11 September 2001" (A/62/263, para. 34). In its resolution 1373 (2001), the Security Council called upon States to take appropriate action, before granting refugee status, in conformity with national and international law, including international human rights law, to ensure that the asylum-seeker has not planned, facilitated or participated in terrorism. In the same resolution, States were called upon to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts.[31] Those provisions reinforce the misperception that international refugee law is an obstacle when it comes to addressing security concerns.

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[26] Ben Hayes and Mathias Vermeulen, "Borderline: the European Union's new border surveillance initiatives — assessing the costs and fundamental rights implications of EUROSUR and the 'Smart Borders' proposals" (Heinrich Böll Foundation and The Greens/European Free Alliance, June 2012).

[27] European Union Agency for Fundamental Rights, *Fundamental Rights at Europe's Southern Sea Borders* (Luxembourg, Publications Office of the European Union, 2013).

[28] François Crépeau and Anna Purkey, "Facilitating Mobility and Fostering Diversity: getting EU Migration Governance to Respect the Human Rights of Migrants", Liberty and Security in Europe, No. 92 (Brussels, CEPS, May 2016). Available from https://www.ceps.eu/system/files/LSE%20No%2092%20Facilitating%20Mobility.pdf.

[29] See, for example, François Crépeau, "Mainstreaming a human rights-based approach to migration within the high-level dialogue", statement by the Special Rapporteur on the human rights of migrants, 2 October 2013.

[30] Convention relating to the Status of Refugees (1951) article 31.

[31] See also resolution 51/210.

22. The Special Rapporteur recalls that the 1951 Convention relating to the Status of Refugees was drafted by individuals who had lived through some of the darkest times of the twentieth century. They were well aware of the need to exclude certain individuals from the protective provisions of refugee law. Thus, while the Convention does not explicitly exclude terrorists,[32] it does take into account the security interests of host communities,[17] and international refugee law provides for the exclusion from refugee status of those who have committed heinous acts or serious crimes (see A/62/263, para. 35).[12]

(i) Exclusion from refugee status and acts of terrorism

23. Article 1(F) of the 1951 Convention relating to the Status of Refugees allows States to deny refugee status to certain persons, including in cases when there are "serious reasons for considering" that they have committed crimes against peace, war crimes or crimes against humanity, serious non-political crimes outside the country of refuge prior to their admission to that country as a refugee or have been guilty of acts contrary to the purposes and principles of the United Nations.[33] As noted by UNHCR, although "acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses, article 1(F) is not to be equated with a simple anti-terrorism provision".[34] Exclusions can apply more broadly.

24. The intention of the drafters of the 1951 Convention relating to the Status of Refugees was for article 1(F)(*c*) to apply in exceptional circumstances to cover human rights violations. However, the observation in resolution 1373 (2001) that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations" has meant that national jurisdictions are increasingly relying on article 1(F)(*c*) to exclude individuals.[35] According to UNHCR, acts that are properly considered to be terrorist in nature, and that are grave enough to affect international peace and security and friendly relations between States, may also fall within the scope of those grounds for exclusion.[22]

25. As with any exception to human rights guarantees, the exclusion clauses must always be interpreted in a restrictive manner and applied with utmost caution (see A/62/263, para. 66).[36,37] In particular, the Special Rapporteur notes that, in examining whether the exclusion clauses apply, national authorities should not rely on the country of origin's definition of terrorism. Many States have adopted overly

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[32] Ben Saul, "Exclusion of Suspected Terrorists from Asylum", Institute for International Integration Studies, Discussion paper, No. 26 (July 2004).

[33] Acts of terrorism can fall within more than one ground of exclusion from refugee status (see *Al-Sirri v. Secretary of State for the Home Department* and *DD (Afghanistan) v. Secretary of State for the Home Department*, judgment of 21 November 2012, No. UKSC 54, para. 3).

[34] See UNHCR statement on article 1(F) of the 1951 Convention relating to the Status of Refugees, July 2009.

[35] Sandesh Sivakumaran, "Exclusion from refugee status, the purposes and principles of the United Nations and article 1(F)(*c*) of the Refugee Convention", *International Journal of Refugee Law*, vol. 26, No. 3 (October 2014).

[36] Committee Against Torture, general comment No. 2 on article 2.

[37] UNHCR, "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of refugees" (Geneva, 2011), para. 180.

broad definitions of terrorism which cover peaceful dissent or acts which are lawful under international humanitarian law.[38] The proper approach to the application of the exclusion clauses is for States to assess whether the acts in question meet the requisite level of seriousness,[39] and whether national provisions comply with the principles of legality, certainty and foreseeability (see A/HRC/16/51, paras. 26-28).

26. The Special Rapporteur notes that the presence of an individual on a list of terrorist suspects or a list of members of a designated terrorist organization should not, in itself, lead to an automatic application of the exclusion clauses, nor a reversal of the burden of proof to the detriment of the individual concerned.[34] Indeed, the presence of an individual or a group on a terrorist list must be addressed with caution. In this regard, the Special Rapporteur has already provided a comprehensive overview of the various shortcomings of the Al-Qaida Sanctions List (see A/67/396 and A/HRC/29/51, para. 38). Although the process is improving, some key concerns remain, including: the lack of transparency in the listing process (see S/2016/96, paras. 36 and 52); the absence of access for petitioners to the comprehensive reports on their cases (see S/2016/96, para. 38); the lack of proper safeguards for the independence of the Office of the Ombudsperson (see S/2016/96, para. 44); the Ombudsperson's limited access to confidential information (S/2016/96, para. 16); and the non-binding status of the Ombudsperson's comprehensive reports. As a consequence, the regime continues to fall short of international minimum standards of due process. Regional and national lists, drawn up pursuant to resolution 1373 (2001), may also lack fair procedures for listing and de-listing and suffer from procedural and due process shortcomings.

27. Thus, neither the presence of an individual on a list as a terrorist suspect nor their membership in a group listed as a terrorist entity should lead to an automatic application of the exclusion clauses[34,40] or be the sole basis for denying an individual refugee status.[34,35,41] An assessment of individual responsibility must be carried out on a case-by-case basis, giving careful consideration to the particular role and personal involvement of the person concerned.[31]

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[38] International Committee of the Red Cross, "The applicability of IHL to terrorism and counterterrorism", October 2015.

[39] Minor offences, even if domestically classified as terrorist crimes, should not lead to exclusion. The commission of acts that constitute elements of an act of terrorism, including killing, abduction and torture, generally constitute "serious" crimes.

[40] In the case *Bundesrepublik Deutschland v. B und D*, the European Court of Justice decided that the listing of an organization "makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor the competent authority must take into account when determining, initially, whether that group has committed acts falling within the scope of Article 12(2)(b) or (c) of Directive 2004/83" (i.e., the exclusion grounds).

[41] See Supreme Court of Canada, *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013, SCC 40, No. 34470; United Kingdom Supreme Court, *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department*, No. [2010] UKSC 15; and United Kingdom, *T v. Secretary of State for the Home Department* (1996); United Kingdom: House of Lords (Judicial Committee), 22 May 1996; and New Zealand: Refugee Status Appeals Authority, refugee appeal No. 74540, 1 August 2003.

(ii) Expulsions and revocation of refugee status and terrorism

28. Once refugee status has been granted, it is still possible for a State to revoke it or to expel individuals based on their being involved in or convicted of acts of terrorism. The Special Rapporteur recalls the position of UNHCR that generalized suspicions based on religious, ethnic or national origin or political affiliation do not justify a general review process, much less a re-opening of a final refugee status determination. A review would be possible, however, if, as part of procedures offering adequate safeguards, it emerged that there were serious reasons for considering that the refugee had committed acts that fell within the purview of the exclusion clauses.[22] Provisions such as those in force in the United Kingdom of Great Britain and Northern Ireland that provide for the revocation of refugee status for "extremist behaviour" or which require that "where there is any evidence that a refugee or their dependants have engaged in unacceptable behaviours (whether in the UK or abroad) considered not conducive to the public good or have acted in a way which undermines British values, their status must be reviewed" go beyond what is permitted by the 1951 Convention relating to the Status of Refugees (see A/HRC/31/65).[42]

29. International refugee law allows States to expel refugees on grounds of national security or public order. It is critical that decisions to expel must be non-discriminatory and proportionate, made on a case-by-case basis, through procedures which respect standards of due process, in which the threat to security posed by the individual is substantiated and in which the individual can provide evidence that might counter the allegations.[22]

(c) The absolute prohibition of refoulement

30. The principle of non-refoulement is a fundamental principle of international law prohibiting the expulsion, return or extradition of persons to a State when there are substantial grounds for believing that they would face the risk of being tortured (see A/HRC/13/39/Add.5, para. 238), face a serious violation of other fundamental rights[43] or be subject to refoulement by the receiving State (indirect or "chain" refoulement). It is the responsibility of the sending State to assess the general situation in the receiving State and the risk facing the particular individual.[44] The manner in which the refoulement occurs is irrelevant to the prohibition, meaning that it also applies to persons refused at borders or pushed back on the high seas. The principle of non-refoulement is broader under international human rights law than under international refugee law. Even individuals who do not qualify for or are excluded from refugee status or to whom an exception to the non-refoulement principle applies, pursuant to article 33(2) of the 1951 Convention relating to the Status of Refugees, may still be covered by the absolute prohibition of refoulement under human rights law.

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[42] United Kingdom Home Office, "Asylum policy instruction: revocation of refugee status", 19 January 2016, p. 14.

[43] European Court of Human Rights, *Othman (Abu Qatada) v. the United Kingdom*, application No. 8139/09, judgment of 9 May 2012.

[44] On systematically targeted minority groups, see Committee against Torture, *Abed Azizi v. Switzerland*, communication No. 492/2012, decision of 27 November 2014; and *Hussein Khademi et al. v. Switzerland*, communication No. 473/2011, decision of 14 November 2014.

31. In recent years, challenges to the non-refoulement principle have been numerous and widespread.[45] Many States have tried to assert that the imperative of fighting terrorism allows all human rights, even those that are absolute, to be weighed against it. States have thus argued that it is necessary to deport dangerous individuals, even to places where there is a real risk that they may be subjected to ill-treatment, in order to protect the population from terrorist threats (see A/HRC/13/39/Add.5, para. 240). While that approach may be in line with the exceptions in article 33(2) of the 1951 Convention relating to the Status of Refugees,[46] it has been rejected by international human rights bodies[47] and regional courts.[48] The Special Rapporteur highlights in that respect that international human rights law fills an important gap in refugee law.

32. In response to the absolute prohibition of refoulement, some States have relied on diplomatic assurances obtained from foreign authorities that they would refrain from torturing an individual upon return (see A/HRC/13/39/Add.5, para. 244; and E/CN.4/2006/6, para. 29). A former High Commissioner for Human Rights described such arrangements as unacceptable since they do not provide adequate protection against torture and ill-treatment[49] and cannot displace the legal obligation of States with respect to non-refoulement (see A/HRC/4/88). A former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment described diplomatic assurances as "nothing but attempts to circumvent the absolute prohibition of torture and non-refoulement".[50] International human rights bodies have clarified that, while diplomatic assurances are not prohibited in all circumstances, they do not absolve a State from its obligation to assess the risk of torture given the individual circumstances of the case.[51] The Committee against Torture has recommended that diplomatic assurances should only be relied upon with regard to States that do not systematically violate the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see CAT/C/USA/CO/2, para. 21). The Special Rapporteur concurs with the position of the Committee.

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[45] World Organization against Torture, "Non-refoulement: achievements and challenges". According to the World Organization against Torture, as of 2014 the Human Rights Committee had raised non-refoulement concerns in 147 concluding observations with regard to 96 State parties.

[46] See also the ruling of the Supreme Court of Canada in *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)*, in which the Court accepted that refoulement could occur in exceptional circumstances if a substantial risk to the national security of the State was proven. No Canadian court has yet found that such exceptional circumstances exist.

[47] See CAT/C/18/D/39/1996, para. 14.5; CAT/C/SR.652, para. 59; CAT/C/NPL/CO/2, para. 17; CAT/C/FRA/CO/3, para. 6; and CCPR/C/CAN/CO/5, para. 15.

[48] In the case of *Saadi v. Italy*, the European Court of Human Rights noted, in response to the third party intervention by the United Kingdom, that the "immense difficulties" for States to protect their communities from the danger of terrorism "must not, however, call into question the absolute nature of article 3", application No. 37201/06, judgment of 28 February 2008, para. 137. Note that, in a later case with a similar outcome, Lithuania, Portugal, Slovakia and the United Kingdom made similar arguments. See European Court of Human Rights, *A. v. the Netherlands*, application No. 4900/06, judgment of 20 October 2010.

[49] Committee against Torture, views on Communication No. 233/2003, *Agiza v. Sweden*, judgment of 20 May 2005 (A/60/44, annex VIII, sect. A), and Human Rights Committee, views on Communication No. 1416/2005, *Alzery v. Sweden*, 25 October 2006 (A/62/40 (vol. II), annex VII).

[50] See A/HRC/13/39/Add.5, para. 243; E/CN.4/2006/6, para. 32; and A/HRC/10/44/Add.2, para. 68.

33. Some of the gravest violations of human rights today are committed by or on behalf of non-State actors, including terrorist networks. An increasing number of asylum seekers are fleeing such atrocities. If international human rights law is to keep pace with those changes, the victims of such acts must now be recognized as victims of grave violations of international human rights law (see A/HRC/20/14, para. 12). The Special Rapporteur emphasizes that the principle of non-refoulement must apply when the individual would run a real risk of ill-treatment if transferred to territory controlled by non-State armed groups. In territories where the real risk of danger to life or ill-treatment emanates from non-State armed groups, relocation to a safer part of the country can be considered.[51] However, if a State is failing to "stop, sanction and provide remedies to victims of torture",[33] it can be difficult to "identify particular areas of the country which could be considered safe for the complainants in their current and evolving situation",[52] and a returning State's non-refoulement obligation must take that into account.

34. "Maritime interception operations", "push-back operations" and "search and rescue operations" on the high seas, such as the Mediterranean Sea and the Indian Ocean (see A/62/263), including those that aim to carry out the blanket return of rescued migrants to one country,[53] are a serious cause for concern in relation to non-refoulement obligations. As the Parliamentary Assembly of the Council of Europe has observed:

> "While the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a 'place of safety', the notion of 'place of safety' does not appear to be interpreted in the same way by all member States. Yet it is clear that the notion of 'place of safety' should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights".[54]

[51] For the guarantees that should be in place as a precondition of relying on an internal flight alternative, see the ruling in relation to Somalia: European Court of Human Rights, *Sufi and Elmi v. UK*, application No. 8319/07, judgment of 28 June 2011. In relation to the situation in Syria, see *LM v. Russia*, application No. 4081/14, judgment of 15 October 2015. In relation to Iraq, see European Court of Human Rights, *A.G.A.M., D.N.M., M.K.N., M.Y.H. and Others, N.A.N.S., N.M.B., N.M.Y. and Others and S.A. v. Sweden*, applications Nos. 71680/10, 28379/11, 72413/10, 50859/10, 68411/10, 68335/10, 72686/10 and 66523/10, judgments of 27 June 2013.

[52] The Committee Against Torture applied this in the case of *Njamba and Balikosa v. Sweden*, Comm. 322/2007, 3 June 2010.

[53] See Niels Franze, "NATO expands Aegean Sea migrant patrols into Turkish and Greek territorial waters: rescued migrants to be automatically returned to Turkey", 7 March 2016. Available from https://migrantsatsea.org/2016/03/07/nato-expands-aegean-sea-migrant-patrols-into-turkish-and-greek-territorial-waters-rescued-migrants-to-be-automatically-returned-to-turkey/.

[54] Parliamentary Assembly of the Council of Europe, resolution 1821 (2011), para. 5.2.

35. The Special Rapporteur recalls that the non-refoulement principle applies extraterritorially,[55] including when individuals are under the effective control of a State acting outside its territory or territorial waters. Any State that sends vessels to carry out interception or search and rescue operations is obliged to respect the prohibition on refoulement and not return individuals to countries where they would face a real risk of danger to their lives, ill-treatment or other fundamental rights violations.

36. It is possible that push-back operations may also violate the prohibition on collective expulsion if the transfer of individuals occurs without an examination of the situation of each individual.[56] The prohibition of collective expulsion under international law imposes a duty of due process, and push-back operations without an individualized assessment are thus generally impermissible, even if there is no risk of refoulement.[57] There must be a reasonable and objective examination, in accordance with the law and free from any arbitrariness, of the full range of circumstances that may militate against the expulsion of each particular individual.[58] Furthermore, the returning State must ensure that the destination country offers sufficient guarantees in the application of its asylum policy to prevent the person concerned from being returned to his country of origin without an assessment of the risks faced.[59]

37. There are serious concerns about bilateral or multilateral readmission agreements and the risk they pose to fundamental rights (see A/HRC/29/36, para. 39).[58] In this respect, the Special Rapporteur is concerned about the European Union-Turkey statement, agreed to on 18 March 2016, which provides for the blanket return of all migrants crossing from Turkey into Greece. The agreement has been widely criticized, even though it is noted in the statement that "this will take place in full accordance with European Union and international law, thus excluding any kind of collective expulsion" and that "all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement". Of particular concern are returns in the absence of individual assessments of migrants' situations that, despite the above statement, may amount to collective expulsion,[60] and reports that Turkey may violate the rights of individuals[61]

[55] See European Court of Human Rights (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, application No. 27765/09, judgment of 23 February 2012; UNHCR, Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 26 January 2007; and "UNHCR legal position: despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations", press release, 4 February 2015. Conversely, see Inter-American Commission on Human Rights, *Haitian Centre for Human Rights and Others v. United States*, case No. 10.675, judgment of 13 March 1997, para. 157.

[56] European Court of Human Rights (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, application No. 27765/09, judgment of 23 February 2012.

[57] See Jan Arno Hessbruegge, "European Court of Human Rights protects migrants against 'push back' operations on the high seas", *Insights*, vol. 16, No. 14 (2012).

[58] OHCHR, Intervener brief of the case of the European Court of Human Rights, *N. D. and N. T. v. Spain*, application Nos. 8675/15 and 8697/15, 9 October 2015.

[59] European Court of Human Rights, *Sharifi and Others v. Italy and Greece*, 21 October 2014.

[60] Human Rights Watch, "European Union: Turkey mass-return deal threatens rights — would harm refugees, undermine European Union's principles", 15 March 2016.

[61] Human Rights Watch, "Q and A: the European Union-Turkey deal on migration and refugees", 3 March 2016.

by detaining them contrary to human rights law and in violation of the principle of non-refoulement.[62] The Special Rapporteur is also concerned that the current proposal for a new European border and coast guard agency would give it competence to carry out return operations from third country to third country, provided that the sending country complies with the European Court of Human Rights.[63] The Special Rapporteur recalls that a State's human rights obligations, including those relating to non-refoulement and indirect or chain refoulement, remain,[64] despite any statement, agreement or any other presumption with respect to a State's compliance with international human rights law.[65]

38. The Special Rapporteur recalls that the procedural guarantees for non-refoulement exist wherever individuals may find themselves, on land or at sea.[56] The Special Rapporteur thus recommends that procedures for challenging a decision to return an individual be made available to all migrants and refugees at points of disembarkation.[66] If they are not made available, or if other human rights violations are committed during rescue and interception operations, border authorities must be held accountable even if the violations occur extraterritorially.[26] Joint operations involving several States and international or regional bodies may be

[62] See Amnesty International, "Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after European Union refugee deal", 23 March 2016; "Europe's gatekeeper: unlawful detention and deportation of refugees from Turkey", 16 December 2015; and "European Union-Turkey deal: Greek decision highlights fundamental flaws", 20 May 2016. On the appeal won by a Syrian national who arrived in Greece against a decision that would have led to his forcible return to Turkey, see Human Rights Watch, "Turkey: border guards kill and injure asylum seekers — border lock-down puts Syrian lives at risk", 10 May 2016.

[63] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No. 2007/2004, Regulation (EC) No. 863/2007 and Council Decision 2005/267/EC" (Strasbourg, 15 December 2015).

[64] European Court of Human Rights (Grand Chamber), *M. S. S. v. Belgium and Greece*, application No. 30696/09, judgment of 21 January 2011, and *Sharifi and Others v. Italy and Greece*, application No. 16643/09, judgment of 21 October 2014. On specific obligations relating to children, see *Tarakhel v. Switzerland*, application No. 29217/12, judgment of 4 November 2014.

[65] See Council of the European Union, "Outcome of the Council meeting" (20 May 2016), in which it was noted that "member States shared the analysis made by the Commission on the measures taken by Turkey since 20 March, including its assessment that Turkey has taken all the necessary steps identified in the communication of 16 March. Member States expressed their conviction that migrants can and should be returned to Turkey in conformity with the European Union-Turkey statement of 18 March". See also European Commission, "Communication from the Commission to the European Parliament, the European Council and the Council: second report on the progress made in the implementation of the EU-Turkey statement" COM(2016) 349, 15 June 2016; the bilateral readmission agreement between Greece and Turkey (1999); and the European Union-Turkey readmission agreement published in Turkey's official journal, 20 May 2016. See also Eric Maurice, "Turkish leader parts ways with the European Union", *EU Observer*, 6 May 2016 and Merve Aydoğan, "Ankara halts readmission agreement with EU, disagrees on anti-terrorism laws", *Daily Sabah*, 6 June 2016, and "Libéralisation des visas en Turquie: Erdogan refuse de réviser la loi antiterroriste", *Le Monde*, 7 May 2016.

[66] The Special Rapporteur on the human rights of migrants has urged the European Union to allow migrants to disembark immediately at the nearest port (A/HRC/29/36, para. 64).

a cause for concern, as a lack of oversight and clear lines of responsibility can lead to impunity on the part of those engaging in such operations.[67]

(d) Detention of migrants

39. As noted by the Special Rapporteur on the human rights of migrants, the systematic detention of irregular migrants has come to be viewed as a legitimate tool.[68] While it is recognized that an unprecedented strain has been placed on the immigration and humanitarian systems in frontline countries such as Greece (see A/HRC/27/48/Add.2), respect for the fundamental rights of migrants and refugees must be the primary concern of States, and such persons must not be detained in conditions that fail to meet basic human rights standards.[69] In a worrying recent development, it has been reported that, following the European Union-Turkey statement, some national authorities have started automatically detaining migrants and refugees, with the help of FRONTEX, without considering alternatives, providing reasons for the detention or considering the particular situation of those vulnerable people.[70]

40. While it is not disputed that States have the right to detain foreigners prior to deportation and extradition, detention should always be a last resort and must comply with the principle of legality. Exhaustive reasons must be given, and deterring irregular migration can never be a legitimate ground for detention. In all cases, detention must be necessary, reasonable and proportionate. The detention of children, however, can never ever be in their best interest:[71] alternatives to detention must be provided to unaccompanied migrant children and families with children. As such, indefinite or mandatory detention should be prohibited. Detention may become arbitrary when the State does not have any intention of deporting or extraditing the individual; when the State is not diligent enough in carrying out asylum, deportation or extradition procedures, or when the procedures take too long; and when, for legal or practical reasons, the deportation or extradition becomes impossible. In addition, the procedural guarantee of habeas corpus must always be provided, as well as minimum conditions of detention that safeguard the individual's dignity.

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[67] As observed by the Council of Europe "there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations coordinates" (Parliamentary Assembly resolution 1821 (2011), para. 5.4). On responsibility for joint operations, such as NATO and FRONTEX, see Manfred Nowak and Anne Charbord, "Prohibition of torture and inhuman or degrading treatment or punishment", in Steve Peers and others, eds., *The EU Charter of Fundamental Rights: A Commentary* (Oxford, United Kingdom, Hart Publishing, 2014).

[68] A/HRC/23/46, paras. 47-52, and CCPR/C/CAN/CO/6, para. 12.

[69] European Court of Human Rights, *Affaire A. Y. v. Greece*, application No. 58399/11, judgment of 5 November 2015; *Khlaifia and Others v. Italy*, application No. 16483/12, judgment of 1 September 2015; *E. A. v. Greece*, application No. 74308/10, judgment of 30 July 2015; *Mahammad and Others v. Greece*, application No. 48352/12, judgment of 15 January 2015.

[70] Human Rights Watch, "Greece: asylum seekers locked up, wretched conditions for people in need", 14 April 2016; Amnesty International, "Greece: refugees detained in dire conditions amid rush to implement EU-Turkey deal", 7 April 2016.

[71] Committee on the Rights of the Child, "Report of the 2012 Day of General Discussion: the rights of all children in the context of international migration".

41. States have repeatedly attempted to use administrative detention as a means of dealing with foreign nationals considered to be a security threat (see A/62/263, paras. 40-48). As a former High Commissioner for Human Rights noted in 2006, "countries are using various laws at their disposal — asylum, immigration, extradition and so on — to remove persons alleged to constitute national security threats from their territories. In particular one sees an attempt to avoid the heavy due process requirements of the criminal system by turning instead to the administrative law framework".[72] That tendency was observable in Canada's certificates under the Immigration and Refugee Protection Act of 2001 for detention of foreign nationals for up to 120 days without review, followed by removal and in the United Kingdom's indefinite detention of foreign terror suspects under the Anti-terrorism, Crime and Security Act of 2001. These schemes were deemed by national and international courts to be either unconstitutional and/or discriminatory and/or in breach of fundamental rights.[73] It is crucial that, amid mounting terrorism concerns and increased numbers of migrants and refugees moving into foreign territories, States do not resort to similar measures that violate human rights.

B. Measures to address the "foreign terrorist fighter" phenomenon

42. The issue of foreign fighters is not a new phenomenon, but it has increased significantly in importance with the armed conflicts in Iraq and the Syrian Arab Republic (see A/HRC/29/51). According to the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004), the phenomenon of foreign terrorist fighters has evolved to an unprecedented degree over the past four years and now poses an acute and growing threat to international security (see S/2015/358). While evidence of the involvement of foreign fighters in recent terrorist attacks has, in many cases, yet to be substantiated (S/2015/683, para. 68), the United Nations and a number of States have taken action to address that threat to national security.

1. United Nations resolutions

43. In its resolution 68/276, the General Assembly called upon Member States to address the foreign terrorist fighter threat by enhancing cooperation and developing relevant measures, including information-sharing, border management and appropriate criminal justice responses. In its resolution 2170 (2014), the Security Council called upon Member States to undertake measures to suppress the flow of fighters to join Da'esh and other individuals, groups and entities associated with Al-Qaida in Iraq and the Syrian Arab Republic. In its resolution 2178 (2014), the Council required that further steps be taken in relation to foreign terrorist fighters, defined as "individuals who travel to a State other than their States of residence or

[72] Louise Arbour, United Nations High Commissioner for Human Rights, "In our name and on our behalf", speech at the Chatham House and the British Institute of International and Comparative Law, 15 February 2006.

[73] Supreme Court of Canada, *Charkaoui v. Canada*, judgment of 23 February 2007; Human Rights Committee, communication No. 1051/2002, *Ahani v. Canada* (CCPR/C/80/D/1051/2002); House of Lords, United Kingdom, *A. and Others v. Secretary of State for the Home Department*, judgment of 16 December 2004; European Court of Human Rights (Grand Chamber), *A. and Others v. the United Kingdom*, application No. 3455/05, judgment of 19 February 2009.

nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or receiving of terrorist training, including in connection with armed conflict". Member States are required to prevent the travel of foreign terrorist fighters, to bring them to justice, and to prohibit the funding, organization or facilitation of their travel, including acts of recruitment. Resolution 2178 (2014) is a "legislative resolution, with teeth".[74] It forms part of a preventive criminal justice strategy against terrorism: the acts are punishable per se, before the principal terrorist offences are committed, attempted or specifically planned.

44. Resolution 2178 (2014) includes a strong human rights clause, which reaffirms not only that any measure taken to counter terrorism, including those taken to implement the resolution, must respect international human rights obligations, but it also highlights the importance of respect for the rule of law in counter-terrorism, noting that a failure to do so contributes to radicalization and a sense of impunity. In the resolution, the Security Council noted that terrorism will not be defeated by military, law enforcement and intelligence operations alone, and underlined the need to address the conditions conducive to terrorism, as set forth in Pillar I of the United Nations Global Counter-Terrorism Strategy (see resolution 60/288).

45. As the Special Rapporteur has highlighted elsewhere, there are well-founded concerns about resolution 2178 (2014) (see A/HRC/29/51), including: the broad nature of some of the provisions and the lack of definitions for the terms "terrorism" and "extremism"; the legal uncertainty of efforts to identify those to whom it is intended to apply;[75] the vague and low standard for enforcement action in response to "credible information" that an individual will engage in relevant acts; the stigmatization caused by and the ramifications and imprecision of the labelling of individuals as "terrorists" and "fighters";[76] and the requirement that airlines provide advance passenger information to detect individuals travelling on civilian aircraft who may be foreign terrorist fighters. As stated above, increased border controls and data sharing must respect the principle of non-discrimination and comply with data protection norms. Practices that allow systematic checks of individuals who are

[74] Martin Scheinin, "Back to post-9/11 panic? Security Council resolution foreign terrorist fighters", September 2014.

[75] Daphne Richemond-Barak and Victoria Barber, "Foreign volunteers or foreign fighters? The emerging legal framework governing foreign fighters", *Opinio Juris*, 6 May 2016. Available from http://opiniojuris.org/2016/05/06/foreign-volunteers-or-foreign-fighters-the-emerging-legal-framework-governing-foreign-fighters/.

[76] See the report of the Independent International Commission of Inquiry on the Syrian Arab Republic, entitled "Rule of terror: living under ISIS in Syria", 14 November 2014, paras. 17 and 29. See also Jessica Stern and J-M Berger, *ISIS: The State of Terror* (New York, Harper Collins Publishers, 2015), which notes that ISIL, in an article in its online English-language magazine, *Dabiq*, called for doctors, engineers, scholars and people with military, administrative and service expertise. See also Jayne Huckerby, "Gender, violent extremism and countering violent extremism", *Just Security*, 3 March 2015.

considered to pose a risk following a risk assessment[77] must be based on objective, specific intelligence and behavioural indicators, and not on broad profiles based on ethnicity, religion or race.

2. National implementation measures

46. The Special Rapporteur urges States to ensure that national measures operationalizing Security Council resolution 2178 (2014) fully comply with international human rights law, including the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights. The Special Rapporteur is particularly concerned that the criminalization of offences, such as receiving training for terrorism or travelling abroad for the purpose of terrorism, would rely on national definitions of terrorism that are sometimes overly broad or vague.[78] The criminalization of ancillary offences, which arise from conduct that may be distant from the principal terrorist offence, may also be incompatible with the principle of legality.[78] States have adopted a number of legislative measures, sometimes complemented by administrative and operational measures,[79] to prevent the departure of foreign fighters to conflict areas as well as to prevent the return of foreign fighters from those areas. Those include the seizure, retention, withdrawal and non-renewal of passports or identity cards, the stripping of citizenship, restrictions on travel or entry to territory and various types of house arrests or preventive detention. All of these can have a serious impact on a number of fundamental rights (see A/HRC/29/51).

47. The effective prosecution of the acts covered by resolution 2178 (2014) are a key component in the overall approach of States to foreign terrorist fighters. The Special Rapporteur is cognizant of the difficulties faced by States in prosecuting preparatory or accessory acts relating to foreign terrorist fighters. As noted by the

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[77] The annex to the Commission recommendation of 15 June 2015 states that "based on an analysis of the risks for internal security or analysis of the threats that may affect the security of external borders, checks may be carried out systematically on those persons which fall under this risk assessment" and that "w]ith a view of detecting persons returning back to the European Union from the conflict zones where they were combatting or supporting terrorist organizations, the border guards may systematically check against the databases on particular travel patterns (e.g. flights coming from the geographical areas in the vicinity of conflict zones) a certain category of persons falling under the risk assessment". Common risk indicators concerning foreign terrorist fighters were finalized in June 2015, in close cooperation with national experts, the European External Action Service, European Union agencies and INTERPOL (these have not been made public).

[78] See also the submission of Amnesty International and the International Commission of Jurists to the Council of Europe Committee of Experts on Terrorism, draft additional protocol to the Convention on the Prevention of Terrorism of the Council of Europe, 7 April 2015.

[79] By way of example, in April 2016, the European Union Commission flagged the following as priority measures to be implemented by States: the systematic inclusion and flagging of information relating to terrorism in the Schengen Information System (the European Union's largest security database) and the systematic sharing of information on returning foreign terrorist fighters with Europol's European Counter-Terrorism Centre; the use of common risk indicators to detect terrorist travel when carrying out border checks at the external Schengen border; systematic security checks and registration of all new arrivals at "hotspots" (first reception centres); systematic interviewing and screening of all returning foreign terrorist fighters to assess the level of risk they pose; and the rapid adoption and implementation of the passenger name record directive.

Counter-Terrorism Committee Executive Directorate in its third report on the implementation of resolution 2178 (2014):

> "In most States, prosecutions are undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence against foreign terrorist fighters. Several States have experienced challenges associated with generating admissible evidence or converting intelligence into admissible evidence from information obtained through information and communications technology, particularly social media. The pre-emptive investigation and prosecution of suspected foreign terrorist fighters is a further challenge for all regions, particularly in the light of due process and human rights concerns." (see S/2015/975).

48. In its recent report, the Commission on Crime Prevention noted that "building a solid criminal case requires overcoming major operational or legal challenges. Those include the difficulty in gathering evidence located abroad, in proving the intentional element of the crime or offence committed, and the choice of the right criminal charge." (E/CN.15/2016/6, para. 55).

49. States must ensure fairness at all stages in a prosecution. In particular, States must guarantee the right to a fair trial by an independent and impartial tribunal and must not rely on evidence or intelligence obtained through torture. The Special Rapporteur is concerned that, in order to facilitate prosecutions, legislation that may fall short of human rights standards has been adopted. For example, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism fails to require that there be a causal link between certain offences, such as travelling abroad for the purpose of terrorism, and the principal act of terrorism. That arguably encourages the enactment of national laws that define offences that are overly broad. The Special Rapporteur agrees with the recommendation made by some non-governmental organizations that, in criminalizing training for terrorist purposes or travelling abroad for the purpose of terrorism, the specific intent to carry out, contribute to or participate in an act of terrorism should be an element of the crime.[78,80]

50. Some jurisdictions have enacted as offences the entering or remaining in a "declared area" in which a "listed organization is engaging in hostile activity"[81] or travelling to a "country designated to be a terrorist training country".[82] The offence

[80] Note that intent is currently a requirement in the draft articles 7 to 10 of the European Commission's "Proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism", which criminalizes, inter alia, travelling for terrorist purposes in order to counter the phenomenon of foreign terrorist fighters; the funding, organization and facilitation of such travel, including through logistical and material support, the provision of firearms and explosives, shelter, means of transportation, services, assets and goods.

[81] See the Criminal Code Act (1995) of Australia, as amended 2014. On 2 March 2015, the Minister for Foreign Affairs declared the Mosul district in the Ninewa province of Iraq to be an area where a listed terrorist organization was engaging in hostile activity. The declaration went into effect on 3 March 2015.

[82] See the Prevention of Terrorism Act (2012) of Kenya, art. 30(C)(1): "A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism."

is considered to have been committed regardless of whether there was any terrorist purpose to the travel, that is, it is sufficient that the individual entered the area or the country without being able to show that the purpose of the travel was covered by one of the exceptions.[83] Those provisions reverse the burden of proof, placing the onus on individuals to prove that their travel falls within an exception. Such legislative techniques may conflict with the right to a fair trial, in particular the respect for the presumption of innocence under article 14 of the International Covenant on Civil and Political Rights, which is a non-derogable right.[84]

51. Finally, the Special Rapporteur stresses that, when returning foreign fighters are suspected of having committed war crimes or other international crimes, such as crimes against humanity, that is the basis upon which they should be prosecuted. It may be procedurally quicker and politically expedient to prosecute them under "ordinary" counter-terrorism legislation, but individuals who may be guilty of international crimes should not go unpunished for those crimes.

IV. Conclusions and recommendations

52. **Areas in which terrorist groups are active or party to armed conflicts are a push factor for victims of terrorism to seek safety and a pull factor for foreign terrorist fighters. However, the current discourse focuses on migration as a fuel for terrorism, which has led to migration policies being viewed overwhelmingly through the prism of security.**

53. **States have the obligation to protect their populations from acts of terrorism. That may include adopting a number of border management and immigration-related measures to identify individuals who have committed or are planning terrorist offences. However, asylum and migration policies that are restrictive or that violate human rights can have a counterproductive effect on the efforts of States to counter terrorism by creating more irregular migration and increasing violations of the human rights of migrants and refugees, marginalizing particular communities and reducing prospects for migrants, all of which could become conditions conducive to terrorism. The Special Rapporteur recalls, in particular, that the dehumanization of victims of terrorism has been unanimously recognized by the General Assembly, in the United Nations Global Counter-Terrorism Strategy, as a condition conducive to the spread of terrorism. It is also possible that the stigmatization of certain communities is precisely what terrorist groups seek and may lead to an increase in support among migrant communities.**

54. **As part of an effective counterterrorism policy, it is essential to have a comprehensive migration policy that respects human rights, justice, accountability,**

[83] Compare section 119.2(3) of the Australian legislation to article 30(C)(2) of Kenya's Prevention of Terrorism Act.

[84] See Human Rights Committee, general comment No. 32, para. 6 (CCPR/C/GC/32). See also the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill of 2014, which states that this new offence "does not reverse the onus of proof or presumption of innocence. To the extent that there is a limitation on article 14 of the International Covenant on Civil and Political Rights, those limitations are reasonable, necessary and proportionate to countering the threat posed to Australia and its national security interests".

human dignity, equality and non-discrimination, and that grants victims of terrorism the protection to which they are entitled. Security and the protection of the rights of migrants are not opposing goals; they are complementary and mutually reinforcing.

55. **The Special Rapporteur makes the following recommendations:**

(a) **International borders are not zones of exception from human rights: States must respect their human rights obligations when exercising their jurisdiction at international borders;**

(b) **Irregular migration should not be criminalized: the integrity of freedom of movement, the right to seek asylum and refugee law must be respected;**

(c) **Exclusion from refugee status, expulsions of refugees and revocation of refugee status must always comply with the principles of legality, proportionality, non-discrimination and due process: the presence of an individual on a terrorist list or his membership in a listed organization should not be the sole basis for exclusion;**

(d) **The absolute prohibition of refoulement under international human rights law must always be respected, wherever a State exercises its jurisdiction, even on the high seas: States must respect their non-refoulement obligations even when the risk of ill-treatment emanates from non-State armed groups, including terrorist groups; and all decisions must be taken on a case-by-case basis, respect the prohibition of collective expulsions and comply with due process guarantees;**

(e) **The detention of migrants, refugees and asylum-seekers should always be a last resort: detention must always comply with the principle of legality, and the grounds for detention must be exhaustively listed; minimum conditions of humane and dignified detention must always be respected; detention must never become arbitrary and must always be necessary, reasonable and proportionate; and since the detention of children can never be in their best interest, alternatives to detention must always be provided to unaccompanied migrant children and families with children;**

(f) **All measures taken to address the threat posed by foreign terrorist fighters must comply with international human rights law; specific offences that criminalize related training or travel must comply with the principle of legality; and all prosecutions for those offences must fully comply with fair trial guarantees, in particular those relating to the presumption of innocence.**